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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 472

JOSEPH A. WAGSTAFF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Joseph A. Wagstaff, petitioner, prays that a writ of certiorari be issued to review the decree of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled cause on July 10, 1952; petition for rehearing denied on September 30, 1952.

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit is found in Record 50.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit sought to be reviewed, was entered on July 10, 1952; petition for rehearing was denied on September 30, 1952. Chief Justice Vinson, on the 24th of October, 1952, signed an order extending the period within which to file a petition for a writ of certiorari to November 29, 1952 (R. 63).

Questions Presented

1. Was that petitioner by the act of his trial counsel, and by the failure to act of the trial court, deprived of the effective assistance of counsel and of due process of law in violation of the fifth and sixth amendments, and this court's ruling in *Glasser* v. *U. S.*, 315 U. S. 60; 62 S. Ct. 457.

2. Is not the opinion of the court below in conflict with other circuit court opinions in other jurisdictions, and specifically in conflict with *Di Carlo* v. *U. S.*, 2nd Circuit, 6 Fed. 364.

Statutes Involved

The statutes involved are:

Title 22, Sec. 3202 of the D. C. Code

> "If any person shall commit a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm, he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than five years; upon a second conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than ten years; upon a third conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than fifteen years; upon a fourth or sub-

sequent conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for an additional period of not more than thirty years."

Title 22, Sec. 3204 of the D. C. Code:

"Carrying concealed weapons.

No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other hand possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed: *Provided*, That arrests, without a warrant, and searchers and seizures pursuant thereto, may be made for violation of this section, by police officers, as in the case of a felony, upon probable cause that the person arrested is violating this section at the time of the arrest; but no evidence discovered in the course of any arrest, search or seizure authorized by this proviso shall be admissible in any criminal proceeding against the person arrested unless at the time of such arrest he was carrying a pistol or other dangerous weapon on or about his person."

Statement of the Case

Petitioner was tried and convicted under an indictment containing two counts. The first count charged violation of Title 22, Sec. 3202, D. C. Code, commonly known as armed robbery. The second count charged a violation to Title 22, Sec. 3204, D. C. Code, commonly known as carrying a concealed weapon. The Government contended that petitioner and one Richard Howard Osborne were in a taxicab driven by George Ralph Murray on the night of September 25, 1951. Murray identified petitioner as the individual who held a gun at his back and told him to turn over his money (R. 8). Murray testified further that he turned over $10.60 to petitioner (R. 7). Richard Howard

Osborne was apprehended and pleaded guilty to the robbery of September 25, 1951. Osborne filed a written statement (Defendant's Exhibit 1) which outlined in detail the events of September 25, 1951, and in the statement he said his accomplice was named "Joe" (R. 20). Nowhere in the statement of Osborne, received in evidence as Defendant's Exhibit 1, does the name of petitioner appear (R. 20). Osborne was called as a witness and testified that petitioner was not the individual with him on the night of September 25, 1951. (R. 35). Osborne denied ever identifying petitioner at police headquarters or elsewhere as the man who accompanied him and aided him in the robbery of September 25, 1951.

The Government called to the witness stand one Douglas M. Smith, a policeman who had apprehended petitioner. When Officer Smith was questioned as to the conversation he had with petitioner, he testified that petitioner said "Hell, no. I am not going to tell you. After all, I am a three-time loser" (R. 31). Later the trial judge expressed concern over the remark of the witness Smith for fear that it put in evidence the prior criminal record of petitioner (R. 40). The witness Smith repeated the remark "I am a three-time loser" (R. 31). In arguing to the jury, Government counsel stated that Wagstaff had planned and engineered the robbery of September 25, 1951, and repeated to the jury the remark of Officer Smith that petitioner was a "three-time loser" (R. 47-48).

The Government called one Rufus T. Nash, a policeman, who testified that he questioned the confessed robber Osborne in the presence of petitioner (R. 13, 17). Nash testified that Osborne had stated in the presence of petitioner that petitioner was his accomplice and that petitioner had given him the gun used on the night of September 25th (R. 17). The officer testified that while Osborne was being

questioned in the presence of petitioner, all petitioner stated was that he wanted to see his lawyer (R. 10, 38, 39). Petitioner's counsel objected to all statements made by Osborne in the presence of petitioner, but these objections were overruled by the trial judge (R. 14).

When Osborne was apprehended he possessed $10.60. (Def. Ex. No. 1). Petitioner's counsel moved for a judgment of acquittal but was overruled by the trial judge. The case was submitted to the jury and they returned a verdict of guilty as charged on both counts of the indictment. The Court of Appeals for the District of Columbia Circuit affirmed the judgment of the trial court.

Reasons Relied upon for the Allowance of a Writ of Certiorari

1. It is petitioner's view that the United States Court of Appeals for the District of Columbia Circuit has allowed a conviction to remain unaltered when the record clearly shows that petitioner was not adequately represented by counsel, that his constitutional rights to a fair trial were violated due to the negligence of his trial counsel, coupled with a total absence of any corrective and affirmative measures by the trial judge.

Petitioner had a previous criminal record, and therefore did not choose to take the stand. The Government would thus have been unable in the ordinary course of procedure to have introduced the prior criminal record of petitioner. However, as will be seen in the record, when petitioner's counsel was examining a police officer, the policeman Smith, he gave an unresponsive answer to a question propounded to him which graphically put before the jury the fact that petitioner had been convicted, not once, but had been convicted on three other occasions. The only lamentable reality and obstacle which petitioner must

overcome and which he did not overcome successfully in the United States Court of Appeals for the District of Columbia Circuit, is that petitioner's counsel did not make a motion to strike the statement of Officer Smith, did not move for a mistrial, and did not move that the jury be instructed to disregard the response of Officer Smith.

During the course of the trial the Government called to the stand one Officer Smith, who testified to certain conversations he had with petitioner. During the course of examination, the record reflects the following (R. 31):

> "Q. You had no further conversation with Wagstaff other than what you have related, which took place in the car; is that right?
>
> A. Well I had the conversation of asking him about the gun, about locating the gun.
>
> * * * * * * *
>
> Q. Where was that, in No. 6?
>
> A. Yes, sir.
>
> Q. What did you say?
>
> A. I asked him if he had a gun, or if he would tell us where the gun was, and he stated, 'Hell, no. I am not going to tell you. After all, I am a three-time loser."

Petitioner respectfully points out to the Court that a most detailed examination of Officer Smith on direct examination by the District Attorney revealed no such conversation as that testified to above (R. 29, 30). This fact alone corroborates petitioner's contention that the statement of the officer was perjurious, that the conversation never occurred, and it was a direct attempt on the part of the officer to prejudice petitioner's defense and to put before the jury the fact that appellant had a previous criminal record. Petitioner chose to assert his constitutional right to refuse to take the witness stand, but the statement of the officer in fact put his criminal record

before the jury just as graphically and realistically as the District Attorney would have done if petitioner had taken the witness stand and subjected himself to examination on this point. Petitioner suggests further that the witness repeated the remark (R. 31) and that the District Attorney, in arguing he case to the jury, emphasized the alleged confession of Officer Smith that petitioner was a "three-time loser." The record reflects the District Attorney stated in his closing argument the following (R. 47, 48):

> "Now, Wagstaff, as you have heard, made no statement relative to what the man Osborne in No. 6 Precinct stated, other than the fact that he stated to Officer Smith, in response to where the gun was: 'You don't expect me to tell you where the gun is. After all, I am a three-time loser.' Now, the only other statement he made, according to the officer, was 'I want to see a lawyer.' That is all."

The trial judge, sensing the injustice and prejudice that resulted by the remark of Officer Smith, called it to the attention of petitioner's counsel. This is reflected in the record, page 40.

> "The Court: There is one further evidentiary element the court has given some thought to, and that is the testimony of the officer, who said that the defendant stated that he was a three-time loser.
>
> Mr. Smithson: Officer Smith, Your Honor.
>
> The Court: Officer Smith.
>
> Mr. Ahern: I am worried about that.
>
> The Court: Which raises the question of criminal record. The matter of criminal record is something in reference to which the generally accepted charge of the court is that if the defendant takes the stand, and so on. The court will attempt to charge in effect that the guilt or innocence of this defendant must be determined by the evidence in this case, and in this case alone."

Although the trial court has virtually told petitioner's counsel what to do, his counsel did nothing, and the court did nothing further. Thus the prejudicial testimony of Officer Smith was put before the jury, and petitioner could not take the stand in order to deny the remark of Officer Smith, without subjecting himself to further examination on his past criminal record. We feel that the total omission to act on the part of petitioner's counsel resulted in an absolute denial of any possible effective assistance of counsel within the meaning of this court's ruling in *Glasser* v. *United States*, 315 U. S. 60, 62 S. C. Rep. 457. In *Glasser* v. *United States, supra,* this court stated:

> "Even as we have held that the right to the assistance of counsel is so fundamental that the denial by the state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an *effective appointment of counsel* may so offend our concept of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment." *Powell* v. *Alabama*, 287 U. S. 47.

The mere fact that petitioner's counsel was not appointed by the court in the instant case does not estop petitioner from asserting the constitutional proposition that his counsel was either so negligent or incompetent that the conviction which resulted lacks fundamental fairness within the purview of *Johnson* v. *Zerbst*, 304 U. S. 458. The court below, in its written opinion, stated (R. 50):

> "Alleged errors in the admission of evidence were not in any instance of a character to warrant reversal; in most instances, in fact, no objection was raised during the trial to the testimony now challenged."

The language of the court below overlooks the basic proposition which we assert, namely, that petitioner's counsel not only did not object; he did nothing even when prompted to by the trial court. There can be no doubt

that the jury had before them in fact the prior criminal record of petitioner and this constituted demonstrable prejudice, and the fact that this was first called to the attention of the trial court on the motion for new trial and was then asserted in the Court of Appeals for the District of Columbia Circuit does not prevent its consideration by this court, for this court has stated in *Derry* v. *Cray*, 5 Wall. 795,

> "We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. *But whenever the application of this rule is sought it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.*"

We assert, therefore, that if this court looks beyond the technical requirements of Rule 30 of the Rules of Federal Criminal Procedure, petitioner's counsel did not even attempt to approach the minimum standards necessary to constitute not just the assistance of counsel, but effective assistance of counsel, and because of this, this court should consider the errors and should consider the fact that considering the testimony of Officer Smith, petitioner's counsel failed to do his duty, failed to make any one of the five possible motions which should have been made, and which he was virtually told to make by the trial judge. Considering all of this, whether petitioner's counsel was appointed by the court or was employed, the fact remains, petitioner's rights were not protected. Petitioner would also call the court's attention to the fact that the testimony of Officer Smith was not admissible under theory, for as stated in *People* v. *Spencer*, 106 N. E. 225,

> "The general rule is that a statement in the nature of an admission or confession, in order to be admissible, must relate to the offense in question." Citing

Commonwealth v. *Kosier*, 182 N. E. (2d) 852. *State* v. *Knox*, 18 N. W. (2d) 716. *People* v. *Brown*, 163 Pac. (2d) 85.

Petitioners assert that while courts are hesitant to denominate the conduct of a member of a bar as incompetent, or as negligent, or as lacking in professional quality, there can be no doubt that in this case there is a total absence on the part of petitioner's counsel to protect his rights. It has been stated in *Castro* v. *State*, 196 Indiana 385, 147 N. E. 321,

> "And mere perfunctory action by an attorney assuming to represent one accused of crime which shall fall short of presenting the evidence favorably to him, and invoking the rules of law intended to prevent conviction for an offense of which the accused is innocent, or the requisition of a penalty which is more severe than is deserved, should not be tolerated." *State* v. *Gleeman*, 212 N. W. 203.

We say therefore that within the meaning of *Johnson* v. *Erps*, the judgment below is in fact a nullity. The constitutional rights of petitioner had not been safeguarded, and it becomes the duty of this court to review the judgment below.

2. The lower court's opinion on the question of admissions by silence is in conflict with the ruling in other jurisdictions, and specifically in violation of the Second Circuit's ruling in *Di Carlo* v. *U. S.*, 2nd Circuit, 6 Fed. 364, and is in conflict with the Tenth and Sixth Circuits in *Yep* v. *United States*, 83 F(2d) 41, and *McCarthy* v. *U. S.*, (6th Circuit), 25 F(2d) 298, respectively.

At R. 124 and 125 the trial judge instructed the jury in detail as to the principle of admissions by silence. Specifically the trial judge instructed the jury that the confessed accomplice, Osborne, had made certain statements in the presence of petitioner and petitioner had not denied

or made a response to these accusations. The tri
then went into detail on the law regarding the effect
silence. Petitioner now suggests to this Court
instructions of the trial judge violated the Supreme
ruling in the case of *Bolenbach* v. *U. S.*, 326 U. S.
a study of the authorities clearly establishes the p
that an accused, while under arrest, is under no
speak or reply to accusatory statements made in h
ence. The record shows at 13 and 14 that certai
officers testified that the confessed robber Osborne
fied petitioner as his accomplice and that petitioner
denial or response to the statements of Osborne.
be noted, however, that on the witness stand Osb
nied any such statements and in fact denied that pe
was his accomplice. In any event the statements
officers as to the identification of petitioner by
served as the basis for the trial judge's instruct
the principles of admissions by silence.

The trial judge
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The classic case of *Yep* v. *U. S.*, 83 F(2d) 41 an

> "When one is under arrest or is in custody,
> with crime, he is under no duty to make any st
> concerning the crime with which he stands c
> and statements tending to implicate him, mad
> presence and hearing by others, when he is u
> rest or in custody, though not denied by him,
> admissible against him."

41 announced:
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All of the statements made by Osborne in the
of petitioner were made while petitioner was under
In *U. S.* v. *LoBiondo*, 135 F(2d) 130, the court appr
ruling of *Yep* v. *U. S.*, *supra*, that a defendant is u
duty to speak when under arrest, and approved
guage in *McCarthy* v. *U. S.*, (6th Circuit), 25 F(2
wherein the court stated:

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> "To draw a derogatory inference from mere
> is to compel the respondent to testify; and t

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> tomary formula of warning should be changed, and the respondent should be told 'If you say anything it will be used against you; if you do not say anything that will be used against you.' "

It is also stated by Judge Hand, in *DiCarlo* v. *U. S.*, 6 F(2d) 364:

> "It is a common error to suppose that everything said in the presence of a defendant is ipso facto admissible against him. While the question is a delicate one, depending largely upon the discretion of the trial judge, nevertheless more must appear than that the defendant heard the statement. We think that the evidence of how the defendants met Patiturci's accusation in the police station was plainly not enough to admit the identification as admissions."

It is therefore clearly shown from the record that the instructions of the trial judge on the question of admissions by silence were erroneous and improper. Petitioner was under arrest at the time Osborne made the statements in his presence, and petitioner, under authorities cited above, was under no duty to speak or respond to these accusations.

Petitioner also calls the court's attention to the fact that the remarks made in petitioner's presence were not directed to him. When the witness Osborne was interrogated as to whether petitioner was his accomplice, petitioner made no response, but it is to be noted that the remark of the officer was directed to Osborne and not to petitioner. Petitioner was in custody; he was under no duty to speak; the instructions of the trial judge relating to this were inappropriate; they prejudiced the rights of petitioner; and it now becomes the duty of this court to reverse.

Petitioner also addresses the court's attention to the fact that assuming the trial judge was correct in instruct-

ing the jury on the questions of admission by silence, his instructions were incomplete and equivocal in that the trial judge did not instruct the jury that the only purpose for receiving testimony as to petitioner's silence was to show petitioner's conduct when faced with certain accusations. The jury should have been definitively instructed that they were not to consider the truth or falsity of the accusation but that they were merely to consider the conduct of the accused when accusatory statements were made in his presence. The jury should have been instructed with the principles laid down in *People* v. *Joffel*, 95 Pac. (2d) 160, in which the court stated:

> "When an out of court accusation is made, it is not the accusation, but the conduct of the accused that is evidence, and the accusation is merely admitted to explain the conduct of the accused." See *People* v. *Cacippo*, 93 Pac. (2d) 164. *White* v. *Commonwealth*, 166 S. W. (2d) 373. *State* v. *Bowdry*, 145 S. W. (2d) 127. *People* v. *Luft*, 18 N. Y. S. (2d) 880. *State* v. *Redwine*, 161 Pac. (2d) 205."

Thus the failure to instruct on the legal significance of admissions by silence constituted a violation of this court's ruling in *Bolenbach* v. *U. S.*, 326 U. S. 607, wherein this court stated that a criminal conviction can never rest on the equivocal instruction to a jury on a basic issue.

In view of the authorities above it thus appears that the trial judge committed two serious errors: (1) He should not have instructed the jury on the question of admission by silence; and (2) even assuming, contrary to the record, that petitioner was not under arrest and that admissions by silence would therefore be proper, it was incumbent upon the trial judge to instruct the jury that the sole purpose of receiving such testimony was to show not the truth of the accusatory statements but to show the conduct of

the accused. We therefore feel that in view of the obvious conflict which exists between the circuits, that the ruling in the second circuit, in the opinion written by Judge Learned Hand, correctly state the law, and we feel this conflict should be resolved by this court granting a writ of certiorari.

Conclusion

We feel this case represents a serious proposition for this court to consider. It involves the substantial right to effective assistance of counsel. We feel that within the language of *Snyder* v. *Massachusetts*, 291, U. S. 97, effective assistance of counsel should inure to both the rich and the poor. If a poor man is appointed a counsel who does not protect his rights this court has stated in *Powell* v. *Alabama*, 287 U. S. 47 that conviction will unhesitatingly be set aside. Likewise, if a man of medium means, or even a rich man, were to have a counsel who just flagrantly, negligently, or incompetently did not protect his rights, can there be any doubt but that the conviction which results lacks the requisite qualities of due process which this court has so adequately stated in *Johnson* v. *Zerbst*, 304 U. S. 458. We therefore say to the court that it should grant a writ of certiorari and review the judgment below.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 472

JOSEPH A. WAGSTAFF, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 50-51) is reported at 198 F. 2d 955.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1950 (R. 52) and a petition for *rehearing en banc* was denied on September 30, 1952 (R. 63). By order of Chief Justice

Vinson, the time for filing the petition for a writ of certiorari was extended to November 29, 1952 (R. 63). The petition for a writ of certiorari was filed on November 28, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner was deprived of the effective assistance of counsel.

2. Whether the trial court erred in instructing the jury that under certain conditions, which it specified to the jury, an admission of guilt can be inferred from silence.

STATEMENT

On October 17, 1951, a two-count indictment was returned against petitioner in the United States District Court for the District of Columbia. Count one charged that petitioner and one Osborne, armed with a pistol, by force and violence and by putting in fear stole and took from the person of one George Murray the sum of ten dollars and sixty cents, in violation of D. C. Code 22-2901 and 22-3202. Count two charged that Osborne and petitioner "carried a pistol on or about their person, without a license," in violation of D. C. Code 22-3204. (R. 2-3.) Following a trial by jury, petitioner was found guilty on each count and was sentenced to a term of im-

prisonment of from six to twenty years on count one and a term of one year on count two, the sentences to run consecutively. (R. 4-5.)

The evidence adduced at the trial may be summarized as follows:

Early on the morning of September 25, 1951, after Murray, a taxi driver, had picked up petitioner and Osborne and was driving them to their destination, petitioner, at the point of a gun,[1] commanded Murray to stop the cab. Murray obeyed. The petitioner then demanded Murray's money. Murray gave him all the money he had, which consisted of nine one-dollar bills and a dollar and sixty cents in change, after which Osborne and petitioner ran into an alley. (R. 5-8.) Later that night, Osborne and petitioner were apprehended separately by the police and taken to a police station (R. 27-30).[2]

At the police station, the police found nine one dollar bills and one dollar and sixty cents in change in Osborne's possession (R. 33). At the same time, in petitioner's presence, Osborne admitted his participation in the crime, related the details of the crime, specifically identified petitioner as his partner in the crime, and signed

---

[1] The District of Columbia Metropolitan Police Department records show that petitioner neither at the time of the robbery nor at any time since had a permit to carry a gun in the District of Columbia (R. 34).

[2] From information given by Osborne, the police found the gun in the area where they first discovered the two men (R. 15-16, 26).

a written confession implicating a person named "Joe" (R. 8-9, 13-19, 25, 35). Petitioner remained silent during the interrogation, and merely asked for a lawyer (R. 30).

Police officer Smith, testifying on the Government's behalf, stated that when he apprehended petitioner, petitioner first said "Here I am. I am your man"; then "I am Wagstaff" (R. 29, 30, 31). On cross-examination, police officer Smith testified that when he asked petitioner if he would tell him where the gun was, petitioner said, "Hell, no. I am not going to tell you After all, I am a three-time loser" (R. 30, 31).[3]

Osborne pleaded guilty, but appeared as a witness upon petitioner's behalf. He testified that Wagstaff was not the man with him when he (Osborne) held up Murray. Osborne also denied the accuracy of his signed written confession and stated that it was not his voluntary act. (R. 35-36.)

During the trial, the following occurred (R. 40-41):

> The Court: There is one further evidentiary element the Court has given some thought to, and that is the testimony of the officer, who said that the defendant stated that he was a three-time loser.

[3] The answer was in reply to defense counsel's question as to what Smith asked petitioner in reference to the gun. Smith's answer as quoted above evoked no objection from defense counsel.

Mr. Smithson: [Government counsel] Officer Smith, Your Honor.

The Court: Officer Smith.

Mr. Ahern: [Petitioner's counsel] I am worried about that.

The Court: Which raises the question of criminal record. The matter of criminal record is something in reference to which the generally accepted charge of the court is that if the defendant takes the stand, and so on. The Court will attempt to charge in effect that the guilt or innocence of this defendant must be determined by the evidence in this case, and in this case alone.

Mr. Ahern: Yes, Your Honor.

The pertinent instructions to the jury on this aspect were as follows (R. 45):

> The guilt or innocence of this defendant must be determined by you on the basis of the evidence in this case, and in this case alone.
> * * *

The court also instructed the jury that the burden of proof was on the government to prove petitioner's guilt beyond a reasonable doubt and that no inference of guilt should be drawn from petitioner's failure to testify (R. 43, 45-46).

The judge also instructed as follows (R. 45):

There has been some testimony in this case of certain statements made by Osborne allegedly in the presence of the defendant, Wagstaff. This testimony is admitted because it is the experience in law that if a statement is made concerning the participation in a crime by another individual, the statement being made in his presence and he fails to deny that statement, his failure to deny the statement constitutes an admission. An admission is a concession or acknowledgment by a party of the existence of certain facts. The silence of a party in a particular set of facts and circumstances may constitute an admission by that party. Evidence of silence may be used against the silent party as evidence of an admission, where the silence is improper and unnatural. For you to consider the silence of this defendant as evidence of an admission, there are certain conditions which must be met. First, a reply must have been natural and proper, and the party must have had knowledge of the stated facts and an opportunity sufficient to enable him to reply. The statement of the accused person must have been made in the presence of the other party. It must have been made with reference to facts about the other party, the facts relating to the rights of the silent party. It must have been heard and under-

stood by the silent party, who had an op had an opportunity to reply but did not reply. It reply. It must have been about facts, the truth of which of which was known to the questioner, and it must it must have been made by a person who is entitled t entitled to the information sought.

At the trial, defendant's counsel answ nsel answered "No, Your Honor" to the trial judge's que dge's question whether the defendant desired any fu any further charge. And in response to the judge's inq judge's inquiry whether he had any exceptions to the charge the charge, defendant's counsel answered "None whate ne whatever." (R. 47.)

On appeal, the Court of Appeals affirmed ls affirmed the judgment of conviction (R. 50-52). .

ARGUMENT

Petitioner contends that he was so inadequ so inadequately represented by his personally chosen trial co en trial counsel as to deprive him of a fair trial (Pet. p. 5). Pet. p. 5). He grounds this contention on the fact that at act that at the trial when Officer Smith testified with respe with respect to petitioner's statement made to that officer sh t officer shortly after his arrest that he, the petitioner, wa itioner, was "a three-time loser," his trial counsel did not r el did not move to strike the statement, did not move for a move for a mistrial, and made no later effort to have the o have the jury instructed to disregard the statement (Pet. p ent (Pet. pp. 5-10). Petitioner's contention is without m without merit. After the testimony concerning petitioner's s etitioner's state-

ment made to the officer was spontaneously given during cross-examination of that officer, the trial judge, recognizing possible prejudice, undertook to overcome any prejudicial effect the ambiguous statement might have had by charging the jury that "The guilt or innocence of this defendant must be determined by you on the basis of the evidence in this case, and in this case alone" (R. 45). We submit that this specific charge was amply sufficient to dissuade the jury from letting the statement improperly influence them in reaching their verdict.

Moreover, the making of particular motions or the requesting of particular instructions during the course of a trial are obviously matters which lie peculiarly within the discretion of trial counsel. Like other implements of trial strategy, they may or may not prove to be beneficial to the defendant's cause. Consequently, the failure of a trial counsel to make a given motion or request in behalf of his client may not be properly attacked collaterally or on appellate review, unless the record shows that the defendant's rights were so flagrantly disregarded by counsel of his own choosing as to result in a miscarriage of justice. See *Moss* v. *Hunter,* 167 F. 2d 683 (C.A. 10), certiorari denied, 334 U. S. 860; *Farrell* v. *Lanagan,* 166 F. 2d 845 (C.A. 1), certiorari denied, 334 U. S. 853; *United States* v. *Ragen,* 166 F. 2d 976 (C.A. 7); *Burton* v. *United States,* 151 F. 2d 17 (C.A.D.C.), certiorari denied, 326 U. S.

789; *Diggs* v. *Welch,* 148 F. 2d 667, 669-670 (C.A.D.C.), certiorari denied, 325 U. S. 889. There is no such showing in the instant case.

2. Petitioner also contends (Pet. 10-14) that the court erred in instructing the jury that guilt can be inferred from a defendant's silence, when a participant in crime accuses him in his presence after his arrest. This contention is clearly without substance. The court here correctly stated the general rule that silence by a defendant, when confronted with accusations, is an admission of guilt if made under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth. See *Sparf and Hansen* v. *United States,* 156 U. S. 51, 56. That decision has been followed consistently by the lower courts. *Egan* v. *United States,* 137 F. 2d 369, 380-381 (C.A. 8); *Seeman* v. *United States,* 90 F. 2d 88, 90 (C.A. 5); *Rocchia* v. *United States,* 78 F. 2d 966, 972 (C.A. 9); *Dickerson* v. *United States,* 65 F. 2d 824, 826-827 (C.A. D.C.); *Graham* v. *United States,* 15 F. 2d 740, 742-743 (C.A. 8); 4 Wigmore, *Evidence* (3d ed. 1940), Section 1072.

The applicability or non-applicability of the rule is conditioned on whether the circumstances are such that a person would in the natural course of human behavior contradict accusory statements made in his presence which implicate him in a crime. Whether he was under arrest would be im-

material. See *Sparf and Hansen* v. *United States*, 156 U. S. 51, 56; *Dickerson* v. *United States*, 65 F. 2d 824, 826, 827 (C.A. D.C.); *Rocchia* v. *United States*, 78 F. 2d 966, 972 (C.A. 9). Acquiescence in the truth of a statement clearly may be proved by a course of action as well as by words of agreement. And silence is as probative under certain conditions as verbal admissions would be. The trial court here, in some detail, enumerated the conditions under which such an inference may arise (see *supra*, pp. 6-7), and then left it to the jury to determine whether the conditions warranting such an inference existed in this case. Petitioner was not entitled to more.

CONCLUSION

The judgment below is clearly correct. There are no conflicts of decision, and no occasion for further review. It is respectfully submitted therefore that the petition for a writ of certiorari should be denied.

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